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The Unamendable Core of the United States Constitution

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Comparative Perspectives on the Fundamental Freedom of Expression

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RICHARD ALBERT

The unamendable core of the United States Constitution*

Introduction

In a series of earlier Articles on the structure of constitutional amendment, I have taken the position, which I hold still today, that unamendability poses significant challenges to democratic constitutionalism. The concept of unamendability, which refers to a formally entrenched provision or an informally entrenched norm that prohibits an alteration or violation of that provision or norm, raises fundamental questions in constitutional law implicating sovereignty, legitimacy, democracy and the rule of law.[1] In my view, unamendability undermines the basic promise of democratic constitutionalism because it limits the universe of constitutional possibilities open to those whom the constitution governs.[2] Unamendability, I have argued, withholds from citizens 'more than a mere procedural right' to amend the constitution; it 'hijack[s] their most basic of all democratic rights'.[3] I have also suggested that constitutional rigidity becomes a defect where it makes amendment impossible,[4] and I have illustrated how unamendability confers upon courts disproportionately vast powers in comparison to those exercised by coordinate branches.[5]

As a matter of constitutional *theory*, I therefore resist unamendability as a democratically legitimate constitutional design. But I have often wondered whether I could on any *practical* basis justify some form of unamendability, however limited, as a necessary feature of democratic constitutional design. After all, all rules admit of exceptions, especially in law where the justification for an exception often strengthens the need for a rule of general application. In much the same way, I wonder whether a strong proceduralist committed to democratic first principles could conceivably, even if reluctantly, find value in the political utility of a particular manifestation of unamendability while nonetheless defending a general rule against it.

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* The author extends his sincere thanks to Or Bassok, Laurie Claus, Joel Colón-Ríos, Yaniv Roznai, and Alex Tsesis for comments on earlier drafts of his article appearing in this volume.

[1] Richard Albert, 'Nonconstitutional Amendments' (2009) 22 *Canadian Journal of Law & Jurisprudence* 5, 9–10.

[2] Richard Albert, 'Counterconstitutionalism' (2008) 31 *Dalhousie Law Journal* 1, 47–48.

[3] Richard Albert, 'Constitutional Handcuffs' (2010) 42 *Arizona State Law Journal* 663, 698.

[4] Richard Albert, 'Constructive Unamendability in Canada and the United States' (2014) 67(2) *Supreme Court Law Review* (2d) 181, 186.

[5] Richard Albert, 'Amending Constitutional Amendment Rules' (2015) 13 *International Journal of Constitutional Law* [forthcoming].

In this Article, I inquire whether the United States is one such example. I ask specifically whether anything *should* be regarded as unamendable in the United States but I pose the question in a particular way. The question I wish to explore is narrow but important, and it requires constraining the parameters of the inquiry in order to force an answer at a very low level of abstraction rather than to satisfy ourselves with an answer that remains at a high level of theory.

My objective is to ask whether the United States Constitution should require some form of unamendability, either explicit or implicit, in order to survive according to its own terms. I conclude that the Constitution may indeed require the implicit unamendability of the First Amendment's protections for democratic expression,[6] which I suggest forms the unamendable core of the United States Constitution. I also inquire into the capacity of courts to enforce unamendability in the United States, and I suggest in closing that unamendability may be more effective as an expressive declaration of importance than as a referent for judicial enforceability.

I note, before proceeding, that my choice to focus exclusively on the United States Constitution is driven by both prudence and what I perceive to be necessity. One could certainly advance the claim that democratic expression is an unamendable core of all democratic constitutions, and proceed then to draw from bills of rights around the world to build the case that democratic expression, even where it is not absolutely entrenched, should be unamendable. But I prefer to approach the comparative enterprise with modesty in the face of real differences in the constitutional traditions that underpin constitutional texts, particularly where, as here, the task is to evaluate what holds foundational yet particularised importance in a given constitutional regime.[7]

The democratic objection to unamendability

A formally unamendable constitutional provision, also known as an eternity, perpetuity or entrenchment clause, is impervious to formal amendment, even with supermajority or unanimous agreement from the political actors whose consent is required to alter the constitutional text.[8] Formal unamendability was once rare but it is now increasingly

[6] It is worth considering whether the First Amendment was a mere 'amendment' or whether it amounted to a 'revision' that transformed the United States Constitution, as did the Fourteenth Amendment. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 1998) 288–94. On my reading, the First Amendment made explicit the democratic values of self-government that were already embedded in the Constitution. See Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Law Review* 245, 252.

[7] A further reason that compels caution in too quickly generalising across jurisdictions is the extraordinary difficulty of formally amending the United States Constitution as compared to other national constitutions. See Donald S Lutz, *Principles of Constitutional Design* (CUP 2006) 170.

[8] Of course, no constitutional provision, not even an unamendable one, can survive revolution. See Jeffrey Goldsworthy, *Parliamentary Sovereignty* (CUP 2010) 70. For a recent illustration of the limited constraining force of formal unamendability in the face of violent change, see Yaniv Roznai and Silvia

common in modern constitutions. From 1789 to 1944, no more than 20 percent of all new constitutions entrenched formal unamendability, as compared to 25 percent between 1945 and 1988, and over 50 percent from 1989 to 2013.[9] Unamendability need not always be formal. Unamendability may also be *informal*, a phenomenon that poses its own challenges. In this Part, I distinguish between formal and informal unamendability, and I evaluate their consequences for democratic constitutionalism.

The purposes of formal unamendability

Although nothing in the United States Constitution is today formally unamendable, the Constitution entrenches two expired examples of formal unamendability as well as a current example of constructive unamendability. Constructive unamendability refers to a constitutional provision that is unamendable not as a result of constitutional design but as a result of the present political climate that makes it today practically unlikely, despite being theoretically possible and perhaps even practically possible in the future, to gather the required majorities to amend it using the constitution's formal amendment rules.[10] It is therefore *not* unamendable by virtue of a textual rule against its amendment. The Equal Suffrage Clause, for example, guarantees that 'no State, without its Consent, shall be deprived of its equal Suffrage in the Senate'.[11] It is *constructively* unamendable because no state would today agree to a diminution in its representation in the Senate. Constructive unamendability is not my focus in this Article.

Formal unamendability, in contrast, effectively disables a constitution's formal amendment rules. It refers to one or more provisions in the constitutional text that are expressly designated as unalterable under the formal amendment rules. Constitutional designers can make anything unamendable: a principle, rule, value, structure, symbol or institution.[12] Absolutely entrenching something against amendment creates a distinction between it and a freely amendable constitutional provision, signalling the greater relative significance of the provision that has been shielded from formal amendment.[13]

The United States Constitution entrenches a now-expired temporary form of formal unamendability in the following clause of its amendment rule in Article V: 'Provided that no Amendment which may be made prior to the Year One thousand eight hundred

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Suteu, 'The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle' (2015) 16 *German Law Journal* 542. My inquiry here is limited to continuous constitutional change governed internally by amendment rules.

[9] See Yaniv Roznai, 'Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers' ch 2, 28 (unpublished dissertation on file with author).

[10] Richard Albert, 'Constitutional Disuse or Desuetude' (2014) 94 *Boston University Law Review* 1029, 1043.

[11] US Const, art V (1789).

[12] On the structure of unamendable provisions, see Yaniv Roznai, 'Unamendability and the Genetic Code of the Constitution' (2015) *European Review of Public Law* [forthcoming]

[13] Lech Garlicki and Zofia A Garlicka, 'External Review of Constitutional Amendments? International Law as a Norm of Reference' (2011) 44 *Israel Law Review* 343, 349.

and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article'.[14] The first and fourth clauses of Article I, Section 9 were formally unamendable from the moment of the coming-into-force of the Constitution in 1789 until the year 1808. Article I, Section 9, Clause 1 authorised states to move and import slaves, and Article 1, Section 9, Clause 4 guaranteed that taxation would be census-based.[15] Both clauses formed part of the Constitution's institutionalised framework for the protection of slavery.[16] These two formally unamendable provisions were necessary for the slave holding states to approve and ratify the Constitution. The authors of the Constitution entrenched these slave trade protections as temporarily unamendable until the year 1808 with the objective of later returning to the subject in twenty years to reconsider it 'with less difficulty and greater coolness'.[17]

These two now-expired temporarily unamendable slave trade clauses reflect one of the five purposes of formal amendability: to secure a constitutional bargain.[18] Where political actors reach an impasse on a divisive question of constitutional design, they may choose to make a resolution formally unamendable only for a defined period of time or they may alternatively opt to make an enduring compromise formally unamendable, a constitutional design choice that frees them to deal with other matters of basic governmental structure and function.[19] The use of formal unamendability to secure a constitutional bargain is appropriate for temporary agreements that political actors may choose to revisit after the constitution has been given time to take root in the political culture.[20] It is not uncommon, for instance, for new constitutions to prohibit formal amendments for a fixed number of years immediately upon their ratification.[21]

Formal unamendability may also be deployed for a second purpose: to preserve a core feature of the self-identity of the state. This preservative function of unamendability privileges one or more constitutional principles, rules, values, structures or institutions as fundamentally constitutive of the regime. Preservative unamendability reflects the

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[14] ibid.

[15] US Const, art I, § 9, cl 1; US Const, art I, § 9, cl 4.

[16] Jamal Greene, 'Originalism's Race Problem' (2011) 88 *Denver University Law Review* 517, 518–19.

[17] Douglas Linder, 'What in the Constitution Cannot Be Amended?' (1981) 23 *Arizona Law Review* 717, 721.

[18] Rosalind Dixon and Tom Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 *International Journal of Constitutional Law* 636, 644. One can understand unamendability in this respect as a 'gag rule' that silences debate on matters of contention. See Stephen Holmes, 'Gag Rules or the Politics of Omission' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (CUP 1993) 19–58.

[19] For more on temporary unamendability in the United States and elsewhere, see Ozan O Varol, 'Temporary Constitutions' (2014) 102 *California Law Review* 409, 439–48.

[20] For an analysis of the forms of temporal restrictions on formal amendment, see Richard Albert, 'The Structure of Constitutional Amendment Rules' (2014) 49 *Wake Forest Law Review* 913, 952–54.

[21] See eg Cape Verde Const, pt VI, tit III, art 309(1) (1980) (prohibiting formal amendments for five years following ratification of the constitution).

judgment of the drafting generation that the unamendable feature is important at the time of the adoption of the constitution and that successor generations should respect the sacredness of both this founding judgment and the entrenched feature itself.

Constitutional states entrench many examples of preservative unamendability. For example, Brazil and Germany both make federalism unamendable as a way both of preserving a governmental structure that has historically been necessary to manage conflict and disagreement, and of recognizing its centrality to political life.[22] We can likewise interpret the absolute entrenchment of an official religion, or indeed of secularism, as an expression of the importance of religion or non-religion in that constitutional regime, either as a reflection only of the views of the constitutional drafters or of the views of citizens as well, or indeed both. Algeria and Iran make Islam unamendable as the official state religion, whereas Portugal and Turkey establish secularism as an unamendable feature of the state.[23] Both reflect a founding value intended to be preserved.

In contrast to its preservative function, formal unamendability may also be used to transform a state. This is a third purpose of unamendability. Transformational unamendability seeks to repudiate something about the past and to adopt a new operating principle that will shape and inform a new constitutional identity.[24] This is sometimes more of an aspiration than a justiciable commitment, but it nevertheless serves to express a constitutional value deemed important enough by the authoring generation to make it unremovable from the constitutional text. Transformational entrenchment is intended to reflect the state's commitment to pursuing the values served by the entrenched constitutional provision and to urge respect for the entrenched provision by present and future political actors, present and future citizens, as well as present and future external actors.

Constitutional states entrench many examples of transformational unamendability. For example, under the new Bosnian and Herzegovinian Constitution, all civil and political rights are formally unamendable,[25] in contrast to the regime that predated the new constitution.[26] The Ukrainian Constitution today likewise makes all rights unamendable,[27] something that would have been unimaginable before the new constitution came into force.[28] As a final illustration, consider the Namibian Constitution,

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[22] Albert (n 2) 679.

[23] Compare Algeria Const, tit IV, art 178(3) (1989), Iran Const, art 177 (1980), with Portugal Const, pt IV, tit II, art 288(c) (1976), Turkey Const, pt I, art 4 (1982).

[24] For useful illustrations of the use of unamendability as a transformative device in Germany, India, and South Africa, see Gábor Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19 *Constellations* 182, 183–88, 190–91.

[25] Bosnia and Herzegovina Const, art X, para 2 (1995).

[26] Anna Morawiec Mansfield, 'Ethnic But Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina' (2003) 103 *Columbia Law Review* 2052, 2056.

[27] Ukraine Const, tit XIII, art 157 (1996).

[28] Richard CO Rezie, 'The Ukrainian Constitution: Interpretation of the Citizens' Rights Provisions' (1999) 31 *Case Western Reserve Journal of International Law* 169, 175–81.

which makes rights and liberties unamendable,[29] also in contrast to its own problematic past infringements on rights.[30] These examples suggest how formal unamendability may be used to help transform a state's default posture from rights infringement to rights enforcement.[31] Although formal unamendability cannot by itself defend rights from abuse, it can express the significance that constitutional designers attribute to rights enforcement along with their hope that their successors will ultimately and durably agree.

Fourth, formal unamendability may be a reconciliatory device. The purpose of reconciliatory unamendability is to achieve peace by absolving factions and their leaders of criminal or civil wrongdoing in an effort to move past conflict and discord. For example, reconciliatory unamendability is illustrated by a formally unamendable grant of amnesty or immunity for prior conduct leading to a coup or an attempted one. By conferring amnesty upon political actors, constitutional designers seek to avoid a contentious and potentially destabilizing criminal or civil prosecution of wrongdoers by putting prosecution off the table altogether. The goal is instead to allow opposing factions to start afresh, free from threat of legal action, and sometimes in tandem with a Truth and Reconciliation Commission to give victims the opportunity to air their views and to record their memories but without invoking the consequence of legal duty and violation.[32] An example of reconciliatory unamendability is the now-superseded 1999 Constitution of Niger, which entrenched an unamendable amnesty provision for those involved in two coups—on 27 January 1996 and 9 April 1999—in order to give the new constitutional settlement a chance to succeed without the looming threat of the governing party prosecuting the opposition for earlier acts.[33]

The fifth purpose of unamendability is related to each of the other purposes: to express constitutional values. Where a constitutional text distinguishes one provision by making it immune to the formal amendment rules that ordinarily apply, the message both conveyed and perceived is that this provision is more highly valued than those not granted the same protection.[34] Whether or not the absolute entrenchment of a given provision is intended to be enforceable, unamendability is nevertheless an important statement about the value, either objective or subjective or both, of the provision to that constitutional community. It is the ultimate expression of importance that can be communicated by the constitutional text. For example, the Cuban Constitution's absolute entrenchment of socialism is a statement of the importance of socialism,[35] just

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[29] Namibia Const, ch XIX, art 131 (1990).

[30] Adrien Katherine Wing, 'Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa' (1993) 11 *Wisconsin International Law Journal* 295, 337–44.

[31] Albert (n 2) 685–87.

[32] ibid 693–98.

[33] Niger Const, tit XII, art 136 (1999) (superseded); Niger Const, tit XII, art 141 (1999) (superseded).

[34] Richard Albert, 'The Expressive Function of Constitutional Amendment Rules' (2013) 59 *McGill Law Journal* 225, 254.

[35] Cuba Const, s 3 (1976) (as amended in 2002).

as the Afghan Constitution's absolute entrenchment of Islam and Islamic Republicanism reflect its highest constitutional values,[36] according to the authors of these constitutions. The expressive purpose of unamendability differs from its transformational purpose, the latter entailing a temporally-prior social or political referent that the unamendability seeks to repudiate. The expressive purpose need not necessarily reflect a repudiation of the past; it may instead reflect altogether new values without reference to an old or superseded constitutional order or text.

The roots of informal unamendability

As illustrated by these examples, unamendability generally derives from its formal entrenchment in a constitutional text. But unamendability may also derive informally from judicial interpretation. Where the constitutional text does not expressly immunise a constitutional provision from formal amendment, a court may, in its own interpretation of the constitutional text, identify either a written provision or an unwritten principle as implicitly entrenched against formal amendment. Although the forms of unamendability differ in these two cases—in the former, the text entrenches unamendability, and in the latter, the court imposes it—the result is indistinguishable insofar as both forms of unamendability bind political actors in that constitutional regime. There is therefore little functional difference between the informal unamendability that judges interpret and the formal unamendability that constitutional designers affirmatively choose to entrench in the text. Both forms of unamendability may serve the same five functional purposes.

Informal unamendability is rooted in the distinction between formal amendment and revision.[37] Both are types of constitutional change, though only the former preserves legal continuity in the regime. Formal amendment authorises alterations to the constitutional text 'only under the presupposition that the identity and continuity of the constitution as an entirety is preserved'.[38] An amendment may therefore delete, refine or add to the text provided that it does not 'offend the spirit or the principles' of the constitution.[39] It must, in other words, be consistent with the existing constitution and must 'preserve the constitution itself'.[40] Perhaps the best way to conceptualise an

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[36] Afghanistan Const, art 149 (2003).

[37] It is important to recognise that there is no consensus on the terminology used to refer to this distinction. Indeed some national constitutions use the term 'revision' to refer to amendment. See eg France Const, tit XIV, art 89 (1958); Japan Const, ch IX, art 96 (1947). The concept of 'revision' may alternatively be referred to as 'total reform' or 'replacement' and there are also many variations in the terms used to refer to an 'amendment', namely 'partial reform' or 'reform'. The point is to draw a distinction between major and minor consequences of textual alteration.

[38] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer transl, ed, Duke University Press 2008) 150.

[39] ibid 153.

[40] ibid 150.

amendment in contrast to a revision is a useful ship analogy: an amendment keeps the constitution on course and does not change its direction in midstream.[41]

A revision is something more dramatic than an amendment. It constitutes a substantial change to the constitution, one that takes the constitution off its course in a departure from its fundamental presuppositions and organizational framework.[42] A revision, unlike an amendment, ruptures continuity in the legal order and effectively creates a new regime, even if the constitution that is subject to the revisionary change remains in force unchanged textually except to the extent of the revision.[43] Revision therefore achieves large, often wholesale, constitutional change, for example the repeal of the First Amendment or the transformation of the structure of government from a parliamentary to presidential system.[44] In contrast, amendment is more commonly used to refer to narrow, non-transformative alterations, for instance a change in the date of the installation of the head of government from March to January in a given year.[45]

Distinguishing amendment from revision requires a theory about what in a given constitution is fundamental. Some constitutional texts clearly express their non-negotiable values somewhere in the constitutional text, whether in the preamble or elsewhere.[46] We can infer from these values what kinds of changes would fall within the permissible scope of the amendment power and which may be changed only by invoking the more elaborate and participatory process that revision requires.[47] Still, the

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[41] Jason Mazzone, 'Unamendments' (2005) 90 *Iowa Law Review* 1747, 1776.

[42] Thomas M Cooley, 'The Power to Amend the Federal Constitution' (1893) 2(4) *Michigan Law Journal* 109, 118.

[43] Peter Suber, *The Paradox of Self-Amendment* (Peter Lang Publishing 1990) 18–20.

[44] Note that it is in theory possible for a change labelled as a 'revision' to preserve the identity of the constitution while a change labelled as an 'amendment' could on its own transform the entire framework of government.

[45] John Rawls, *Political Liberalism* (Columbia University Press 1996); Walter F Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Johns Hopkins University Press 2007) 498 n 4. In the United States, the Twentieth Amendment changed the date of presidential installation from 4 March to 20 January. See US Const, amend XX (1933).

[46] See eg Angola Const, prmbl (2008); Kazakhstan Const, art 1(1) (1995); Paraguay Const, prmbl (1992); South Africa Const, s 1 (1996); Spain Const, s 1 (1978); Zambia Const, prmbl (1991).

[47] One might well wonder, as Alex Tsesis suggested to me in an earlier exchange, whether the preamble to the United States Constitution could or should be regarded as unamendable. The Supreme Court, in 1905, suggested that the preamble is non-justiciable but said nothing about its amendability:

> Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom.

Jacobson v Massachusetts, [1905] 197 US 11, 22.

distinction between amendment and revision remains largely theoretical.[48] Whether a given change amounts to an amendment or a revision is often if not always contestable. In the United States, the Constitution's fundamental norms and self-identity are debatable.[49] The Constitution does not reveal in its text what is 'most' important; all constitutional provisions are today freely formally amendable. Yet even if we posited that one norm was implicitly unamendable, reasonable observers could disagree about which one holds that special status.[50] And even if we could somehow agree on that front, we might still disagree on how to interpret the scope of the norm that holds special status, be it the freedom of expression, the separation of powers, or something else.

Although the distinction between amending and revising a constitution appears nowhere in the text of the United States Constitution, it is well rooted in the American *state* constitutional tradition.[51] The California Constitution is a useful illustration of a state constitution distinguishing between an amendment and a revision. The text acknowledges the distinction in recognising both amendment and revision,[52] but California courts have had to elaborate its meaning. As early as 1894, the Supreme Court of California defined an amendment as 'such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.'[53] A revision, on the other hand, is a 'far reaching change in the nature and operation of our governmental structure'[54] or that 'substantially alter[s] the basic governmental framework set forth in our Constitution.'[55] More recently, the California Supreme Court reaffirmed that a constitutional revision is a 'fundamental change in the basic governmental plan or framework established by the pre-existing provisions of the California Constitution.'[56] Other state courts have interpreted the distinction in a similar fashion.[57] But federal courts in the United States have yet to interpret the United States Constitution consistent with this distinction.

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[48] But some constitutions make explicit the distinction between amendment and revision, or between a partial and total revision, by requiring political actors to satisfy different procedures for each. See eg Austria Const, ch II, art 44(3) (1920); Spain Const, pt X, arts 166–68 (1978); Switzerland Const, tit VI, ch 1, arts 192–95 (1999).

[49] Laurence H Tribe, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role' (1983) 97 *Harvard Law Review* 433, 440.

[50] Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007) 148.

[51] Gerald Benjamin, 'Constitutional Amendment and Revision' in G Alan Tarr and Robert F Williams (eds), *State Constitutions for the Twenty-First Century, Vol 3: The Agenda of State Constitutional Reform* (State University of New York Press 2006) 178 (noting that 23 state constitutions expressly reference the term 'revision').

[52] California Const, art XVIII, paras 1–4 (1879).

[53] *Livermore v Waite*, [1894] 102 Cal 113, 118–19 (Cal).

[54] *Amador Valley Joint Union High School District v State Board of Equalization*, [1978] 22 Cal 3d 208, 221 (Cal).

[55] *Legislature v Eu*, [1991] 54 Cal 3d 492, 510 (Cal).

[56] *Strauss v Horton*, [2009] 46 Cal 4th 364, 441–42 (Cal).

[57] See eg *Bess v Ulmer*, [1999] 985 P 2d 979, 982 (Alaska); *Adams v Gunter, Jr*, [1970] 238 So 2d 824, 829–30 (Fla); *In re Opinion to the Governor*, [1935] 178 A 433, 439 (RI).

Where the text does not express its non-negotiable constitutional values nor does it entrench formal rules entrenching unamendability, judges may in the course of interpreting the constitution designate a provision, principle, rule, structure or institution as unamendable. The prompt for courts to declare something unamendable is commonly, though not always, a formal amendment that political actors have duly passed into law in conformity with the procedures entrenched in the constitutional text. A party then argues in court that the formal amendment violates a constitutional norm, either written or unwritten, the result being that the formal amendment, although having satisfied the textual strictures for amending the constitution, comes under judicial review for its constitutionality. The possibility of an unconstitutional constitutional amendment may be a difficult concept to understand since the very basis of the formal rule of law is to legitimate the actions of political actors who successfully adhere to and execute fair legal rules.[58] But courts around the world are increasingly embracing the idea of an unconstitutional constitutional amendment, with subscribers in one form or another in Brazil, the Czech Republic, Germany, India, Italy, South Africa, Turkey and elsewhere.[59]

The Indian Supreme Court illustrates how courts may use the distinction between amendment and revision to informally entrench something as unamendable. In India, the text of the Constitution establishes no limits on the formal amendment power; no subject-matter is off limits, be it federalism, republicanism, secularism or human rights.[60] Nor does the text of the Constitution contemplate the possibility of an unconstitutional constitutional amendment. Yet today, the Supreme Court possesses the power to invalidate a duly passed constitutional amendment for violating the 'basic structure' of the Constitution, a doctrine the Court has created by judicial interpretation.[61] The 'basic structure doctrine' reflects the distinction between amendment and revision insofar as it establishes a judicially enforceable limit on the kinds of constitutional changes that political actors may make using the procedures of formal amendment.

According to the Court, formal amendment is appropriate for constitutional changes that respect the internal architecture of the Indian Constitution because 'in the result the basic foundation and structure of the Constitution remains the same.'[62] But where a constitutional change would violate the basic foundation and structure of the Constitution—for example, a change to constitutional supremacy, democracy, and the separation of powers—formal amendment is inappropriate. Changes to these fundamental features of Indian constitutionalism must instead occur via revision, which effectively entails the adoption of a new constitution, or at the very least the recognition and accompanying validation by special amendment procedures that the constitutional

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[58] Vincent J Samar, 'Can a Constitutional Amendment Be Unconstitutional' (2008) 33 *Oklahoma City University Law Review* 667, 694–95.

[59] See Yaniv Roznai, 'Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea' (2013) 61 *American Journal of Comparative Law* 657, 676–713.

[60] India Const, pt XX, art 36 (1950).

[61] Granville Austin, *Working a Democratic Constitution: The Indian Experience* (OUP 1999) 197–202.

[62] *Kesavananda Bharati v State of Kerala*, [1973] 4 SCC 225, 366 (Sikri, CJ).

transformation is extraordinary.[63] The Court has therefore given itself the role of enforcing the distinction between amendment and revision. In India, as in other countries that have adopted the doctrine of unconstitutional constitutional amendments,[64] the power of formal amendment is limited—even where the text entrenches no substantive limit on how, whether or when political actors may formally amend the constitution.

The consequences of unamendability

The prevalence of formal and informal unamendability should not be used as a shorthand to defend its legitimacy. There is good reason to resist, or at the very least to question, unamendability in both formal constitutional design and informal constitutional evolution, particularly from the perspective of democratic constitutionalism, which I take to require the continuing right of political actors and citizens to redefine themselves through their constitution.

Exercising the right to constitutional amendment requires more than having the nominal right to change the constitutional text by formal alteration or informal evolution. Anchored in the values of participatory democracy, the right to constitutional amendment is the product of prior rights in democratic constitutionalism, including the right to adequate and equal opportunities for participating in public debate, voting equality, informed citizenship and deliberative procedures, as well as the right to effective representation.[65] Unamendability undermines each of these. It disables public discourse as to the unamendable matter, dilutes the vote of present and future generations as compared to the entrenching generation, negates informed citizenship and devalues deliberation, and denies effective representation to the constitutionally-bound generation.

The effect of unamendability, then, is problematic for democratic constitutionalism. Not only does unamendability presuppose perfection in the design and interpretation of the constitutional text,[66] it also stifles democratic innovation and the collective learning that may persuade present and future generations of the desirability of departing from

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[63] ibid.

[64] One of the most recent jurisdictions to adopt the doctrine of unconstitutional constitutional amendment is Belize. See *British Caribbean Bank Limited v Attorney General of Belize*, [2012] Claim No 597 of 2011, online: <http://www.belizejudiciary.org/web/supreme_court/judgements/legal2012/eighth%20amendment.pdf> (invalidating portions of duly-passed constitutional amendment); *Barry M Bowen v Attorney General of Belize*, [2009] Claim No 445 of 2008, <http://www.belizelaw.org/web/supreme_court/judgements/CJ%20Jugments/Claim%20No.%20445%20of%202008%20-%20Barry%20M.%20Bowen%20and%20The%20Attorney%20General%20of%20Belize%20AND%20Belize%20Land%20Owners%20Association%20Limited%20et%20al%20and%20Attorney%20General%20of%20Belize%20-%20Judgment.pdf>.

[65] Robert A Dalh, *Toward Democracy: A Journey* (University of California Press 1997) 61–68.

[66] Schwartzberg (n 50) 202–203.

an absolutely entrenched constitutional provision or norm.[67] Unamendability also has an additional negative practical consequence: it denies political actors and citizens the power to check the courts' own power to interpret the constitution's formal provisions and informal norms.[68] Divesting political actors and citizens of this power risks freezing the text or its interpretation—and often constitutional designers entrench unamendability for this problematic purpose, laudable though the unamendable value may be, for instance the German Basic Law's unamendable right to human dignity.[69]

The two failures of unamendability are therefore its uncompromising orientation to the past and its restrictions on the freedom of democratic expression.[70] In neglecting the importance of the present political process as a basic protection for the exercise of democratic self-government,[71] unamendability raises the problematic possibility of a disjunction between the founding values entrenched in the constitutional text and the actual values that may later evolve to define the polity. The force of constitutionalism, which is the product of a people constituting and reconstituting itself,[72] should derive from the promise that the social contract into which the governed enter with themselves and their governors is to remain a living charter, one whose terms are neither static nor unreflective of the contemporary views of the polity but rather open, dynamic, receptive to new influences, and also adaptable to modern social and political contexts.

A limited theory of democratic unamendability

The democratic objection to unamendability may be grave but it is not fatal to the claim that nothing in the United States Constitution should be unamendable. Although no textual provision in the Constitution today remains formally unamendable nor has the Supreme Court interpreted the Constitution as implicitly requiring any provision or norm to be informally unamendable, unamendability may nonetheless be a condition precedent to democracy in the United States. Indeed one could argue that the democratic roots of the United States Constitution require some form of unamendability, however modest, if the Constitution, which is rooted in the concept of popular sovereignty, is to remain internally coherent on its own terms. In this Part, I advance a limited theory of democratic unamendability in the United States. I suggest that the First Amendment's protections for the exercise of democratic rights could be deemed unamendable and a necessary corollary of the Constitution's promise of robust democracy.

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[67] ibid 197.

[68] ibid 200.

[69] Donald P Kommers, 'The Basic Law: A Fifty Year Assessment' (2000) 53 *SMU Law Review* 477, 479.

[70] One example of a problematic form of unamendability is the Honduran Constitution's prohibition on even proposing changes to the unamendable single-term limit for presidents. See Honduras Const, tit V, ch VI, art 239 (1982).

[71] Edward L Rubin, 'Getting Past Democracy' (2001) 149 *University of Pennsylvania Law Review* 711, 731.

[72] Martin Loughlin, *The Idea of Public Law* (OUP 2003) 113.

The contestability of fundamental values

Although, as a descriptive matter, neither the Constitution's text nor its interpretation makes anything unamendable, scholars have argued that certain features of the United States Constitution *should* as a normative matter be considered unamendable. Yet scholars do not agree on precisely what should be unamendable in the United States. For example, Walter Murphy has written that human dignity, though it is mentioned nowhere in the constitutional text, is an unamendable constitutional value.[73] Similarly, Bruce Ackerman has proposed that the entire Bill of Rights should be made unamendable.[74] Others, like Corey Brettschneider and Jeff Rosen, have contended respectively that the Eighth Amendment[75] and natural rights[76] should be regarded as unamendable despite there being no rule against their formal amendment in the Constitution. Still others, for instance Miriam Galston and David Harmer, have suggested respectively that religious liberty[77] and the Second Amendment[78] should be treated as implicitly unamendable even though the United States Constitution does not designate either, or anything else, as expressly unamendable.

The contestability of fundamental values derives from reasonable disagreement about the core features of the United States Constitution. The relative importance of constitutional norms is debatable and indeed so is the basic identity of the polity in the absence of any peremptory textual delineation of a hierarchy according to which we can reliably prioritise one norm over another.[79] Melissa Schwartzberg is therefore correct to respond to the inescapable scholarly disagreement on the relative importance of fundamental values that '[e]fforts at restricting the boundaries of constitutional amendment are bound to be challengeable, and reasonable people are likely to disagree about what constitutes an unalterable principle'.[80] It is a feature not a flaw of the

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[73] Walter F Murphy, 'The Art of Constitutional Interpretation: A Preliminary Showing' in M Judd Harmon (ed), *Essays on the Constitution of the United States* (Kennikat Press 1978) 156.

[74] Bruce Ackerman, *We the People: Foundations* (HUP 1991) 16.

[75] Corey Brettscheider, *Democratic Rights: The Substance of Self-Government* (PUP 2010) 156.

[76] Jeff Rosen, 'Was the Flag Burning Amendment Unconstitutional?' (1991) 100 *Yale Law Journal* 1073, 1084–89.

[77] Miriam Galston, 'Theocracy in America: Should Core First Amendment Values Be Permanent?' (2009) 37 *Hastings Constitutional Law Quarterly* 65, 124.

[78] David Harmer, 'Securing a Free State: Why the Second Amendment Matters' (1998) *Brigham Young University Law Review* 55, 77.

[79] Tribe (n 49).

[80] Schwartzberg (n 50) 147. This is true also with respect to some formally unamendable constitutional provisions that are cast at a high level of abstraction. In these cases, it is reasonable to expect disagreement on the meaning of the absolutely entrenched provision and how it should be applied to police the conduct of political actors. For example, the German Basic Law makes 'human dignity' unamendable. See German Basic Law, tit I, art 1(1) (1949). The German Constitutional Court has interpreted this formally unamendable provision to require the state to protect pre-natal life over the mother's autonomy interest. See Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 377 (translating, describing and discussing the Abortion I Case (1975), 39 BverfGE 1). It would not be unreasonable for others to disagree with that interpretation.

Constitution that its textual indeterminacy privileges no particular view because this in turn preserves what Heather Gerken describes as 'the ongoing contestability of constitutional law'.[81]

In the face of contestable claims about what should be unamendable, the Supreme Court of the United States has adopted a process-based approach to determining the validity of a constitutional amendment. For the Supreme Court, the text of Article V is the sole source of authority on the constitutionality of amendments. As long as an amendment adheres to the procedural strictures specified in Article V, it is valid and binding. The Court has at least twice declined to invalidate a constitutional amendment challenged as unconstitutional.

One major instance involved the Eighteenth Amendment, which imposed prohibition.[82] In a series of cases before the Supreme Court, the Court dismissed arguments about the amendment's unconstitutionality, holding that the Eighteenth Amendment, '[b]y lawful proposal and ratification, has become part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.'[83] One class of arguments for invalidating the amendment concerned its intrusion into the scope of state police powers.[84] The second class of arguments turned on whether the amendment impermissibly authorised the federal government to interfere with the private lives of individuals.[85] Specifically, some argued that the amendment exceeded the power of government under Article V because the amendment was essentially a legislative act constraining the choices of individuals.[86] Others insisted that the amendment was an unconstitutional violation of the inalienable right to pursue happiness.[87] None of these convinced the Court. The amendment was passed and ratified, and though it was ultimately repealed,[88] it was repealed via Article V itself, not as a result of a judicial declaration of its unconstitutionality.

The Supreme Court also ruled on the Nineteenth Amendment, which granted women the right to vote.[89] Opponents of the measure argued that it was unconstitutional because

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[81] Heather K Gerken, 'The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*' (2007) 55 *Drake Law Review* 925, 937.

[82] US Const, amend XVIII (1919).

[83] *National Prohibition Cases,* [1930] 253 US 350, 386.

[84] See eg Fred B Hart, 'The Amendatory Power Under the Constitution, Particularly With Reference to Amendment 18' (1920) 90 *Central Law Journal* 229, 232; Robert Post, 'Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era' (2006) 48 *William & Mary Law Review* 1, 48–49; George D Skinner, 'Intrinsic Limitations on the Power of Constitutional Amendment' (1919–1920) 18 *Michigan Law Review* 213, 219–21.

[85] Henry S Cohn and Ethan Davis, 'Stopping the Wind that Blows and the Rivers that Run: Connecticut and Rhode Island Reject the Prohibition Amendment' (2009) 27 *Quinnipiac Law Review* 327, 272.

[86] Edward Hartnett, 'Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?' (1997) 75 *Texas Law Review* 907, 951.

[87] Everett V Abbot, 'Inalienable Rights and the Eighteenth Amendment' (1920) 20 *Columbia Law Review* 183, 185–87.

[88] US Const, amend XXI (1933).

[89] US Const, amend XIX (1920).

it divested non-ratifying states of their power over the administration and regulation of elections.[90] The Tenth Amendment, it was argued, was meant to guarantee that a state would not be deprived of that power.[91] According to critics, pushing through the amendment, and in the process violating the Tenth Amendment, was an unconstitutional displacement of sovereignty away from the states.[92] The Supreme Court rejected these state sovereignty claims that the Nineteenth Amendment was unconstitutional: 'The argument is that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid.'[93] What mattered for the Court was again whether the amendment had been proposed and ratified in accordance with Article V. And as it had done before, the Court rejected the possibility of an unconstitutional constitutional amendment.

Democracy's core

There is a deep structural reason why the United States Constitution makes nothing unamendable. The intricate design of the separation of powers places significant institutional and political barriers along the legislative process. Quite deliberately, this makes it difficult to achieve institutional consolidation among the various political actors in the branches of government.[94] This uncompromising separation of powers and parties mitigates against the peril of parliamentary majoritarianism,[95] where the governing majority can generally do what it pleases.[96] In the American model of presidentialism, institutional consolidation behind an amendment requires an extraordinary convergence of preferences. That this is difficult to do makes consolidation worthy of deference when it is achieved. (The separation of powers in the United States therefore assuages the concern that animated the rise of the basic structure doctrine in India, where an amendment may be achieved with few exceptions by a parliamentary majority alone.) Successfully navigating the political process in the United States leads

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[90] William L Marbury, 'The Nineteenth Amendment and After' (1920) 7 *Virginia Law Review* 1, 2–3, 28–29.

[91] Everett P Wheeler, 'Limit of Power to Amend Constitution' (1921) 7 *American Bar Association Journal* 75, 78.

[92] Geo Stewart Brown, 'The Amending Clause Was Provided for Changing, Limiting, Shifting or Delegating "Powers of Government." It Was Not Provided for Amending "The People." The Amendment is Therefore Ultra Vires' (1922) 8 *Virginia Law Review* 237, 239–41.

[93] *Leser v Garnett*, [1922] 258 US 130, 136.

[94] Daryl J Levinson and Richard H Pildes, 'Separation of Parties, Not Powers' (2006) 119 *Harvard Law Review* 2311, 2330–47.

[95] Robert J Lipkin, 'The New Majoritarianism' (2000) 69 *University of Cincinnati Law Review* 107, 149.

[96] Richard Albert, 'The Fusion of Presidentialism and Parliamentarism' (2009) 57 *American Journal of Comparative Law* 531, 562–64.

to an unassailable legitimacy,[97] though not necessarily moral legitimacy but certainly legal legitimacy.[98] Although in practice the last word in constitutional interpretation may belong to the Supreme Court, in theory at least it belongs to the political process.[99] Were Article V not so unusually difficult to use,[100] there would possibly be more than the current handful of examples of constitutional amendments overturning the Court's judgments.[101]

Yet it is worth asking why, given the sacredness of the United States Constitution[102]—a document modelled in the founding period after a 'political Bible'[103]—nothing in it is shielded from the kinds of alterations that could threaten to change its basic structure and content. We can understand the choice to leave the constitutional text open to infinite possibilities as a way to ensure flexibility and endurance.[104] In his farewell presidential address, George Washington spoke to the interrelationship between the Constitution's sacredness and its susceptibility to amendment. 'The basis of our political systems', he emphasised, 'is the right of the people to make and to alter their Constitutions of Government.'[105] But, he added, until the Constitution is duly amended, it 'is sacredly obligatory upon all'.[106] The message here is plain but powerful: whether the choices the people make are good or bad, their choices demand fidelity until they change their view.

It is not the actual choice—yea or nay, one or the other—that matters, however. What matters is the very act of choosing and the way the choice is reached. The Constitution makes no judgment about whether a choice is politically right or wrong; it assesses only whether the choice conforms to the legal process that the constitutional text requires for it to have been made at all. The Supreme Court confirmed this fact of the United States Constitution in a much earlier time, observing of the slave trade clause, census-based taxation, and the Equal Senate Suffrage clause that 'right or wrong politically, no one can deny that the constitution is supreme.'[107] If popular choices like

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[97] Sanford Levinson, *Constitutional Faith* (PUP 1988) 64.

[98] Richard H Fallon, Jr, 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787, 1794–1801.

[99] Charles M Freeland, 'The Political Process as Final Solution' (1993) 68 *Indiana Law Journal* 525, 526–27.

[100] See eg Sanford Levinson, *Our Undemocratic Constitution* (OUP 2006) 21; Arend Lijphart, *Patterns of Democracy* (Yale University Press 1999) 220; Astrid Lorenz, 'How to Measure Constitutional Rigidity' (2005) 17 *Journal of Theoretical Politics* 339, 358–59.

[101] Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (PUP 1988) 201–204.

[102] See Wayne Franklin, 'The US Constitution and the Textuality of American Culture' in Vivien Hart and Shannon C Stimson (eds), *Writing a National Identity: Political, Economic, and Cultural Perspectives on the Written Constitution* (Manchester University Press 1993) 10.

[103] Thomas Paine, *Rights of Man* (Hypatia Bradlaugh Bonner ed, Watts & Co 1910) 98.

[104] Beau Breslin, 'Is There a Paradox in Amending a Sacred Text?' (2009) 69 *Maryland Law Review* 66, 72. Although it may have been the intention at the time of its design, the Constitution cannot today be described as formally flexible.

[105] Horace Binney, *An Inquiry into the Formation of Washington's Farewell Address* (Parry & McMillan 1859) 215.

[106] ibid.

[107] *Dodge v Woolsey*, [1856] 59 US 331, 348.

those are acceptable, we can conclude only that rather than privileging substantive outcomes the Constitution hoists above all else norms of legal process and procedure.[108]

Perhaps, then, the most appropriate way to frame the concept of popular choice in the United States is to understand that it is anchored in the procedural value of outcome neutrality.[109] Under the United States Constitution, no end supported by popular consent is foreclosed because legitimacy is defined by *how* not *what* the people choose.[110] If the requisite number of political actors expresses its will according to the rules of Article V, the constitutional culture of self-government in the United States dictates that its will be done. That is both the origin and the continuing source of the legitimacy of the Constitution. Indeed, the predicate of Article V is that legitimacy derives from the act of successfully assembling the requisite supermajorities to amend the text. Successfully amending the Constitution requires such an overwhelming aggregation of political and popular will that it makes the very fact of agreement the reason why we accept as valid all changes to the constitutional text.[111] It is not the agreement itself but more specifically the difficulty of securing that agreement that breathes legitimacy into the resulting amendment.[112]

First Amendment democratic rights

Popular choice, however, is not an expressly entrenched constitutional right nor would it be self-executing even if it were. It emanates from what the *Griswold* Court might have called the 'penumbra' of the various democratic rights entrenched in the Constitution, and more specifically in the Bill of Rights.[113] But among those democratic rights, the First Amendment's outcome-neutrality and robust protections for the exercise of democracy double as guarantors of popular choice. For a Constitution that makes no unalterable pre-commitment to substantive values, this feature is indispensable because outcome-neutrality facilitates the expression and aggregation of popular choice. The paradox of the United States Constitution, then, is that in order for it to cohere internally as a charter that is freely amendable as a reflection of the prevailing views of political

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[108] Akhil Reed Amar, 'Civil Religion and Its Discontents' (1989) 67 *Texas Law Review* 1153, 1164–65. A recent article takes the view that the Supreme Court's reading of the Constitution as 'neutral' in this sense is only a modern development. See Or Bassok, 'The Court Cannot Hold' (2014) 30 *Journal of Law and Politics* 1, 34-35.

[109] Akhil Reed Amar, 'Philadelphia Revisited: Amending the Constitution Outside Article V' (1988) 55 *University of Chicago Law Review* 1043, 1044 n 1.

[110] *The Federalist* No 46 (James Madison) (Jacob E Cooke ed, Wesleyan University Press 1961) 315 (defending the proposition that 'ultimate authority, wherever the derivative may be found, resides in the people alone').

[111] Brannon P Denning and John R Vile, 'The Relevance of Constitutional Amendments: A Response to David Strauss' (2002) 77 *Tulane Law Review* 247, 274.

[112] Michael C Dorf, 'Equal Protection Incorporation' (2002) 88 *Virginia Law Review* 951, 987.

[113] *Griswold v Connecticut*, [1965] 381 US 479, 484.

actors and the public, whatever those views may be, we must interpret the Constitution as implicitly making the First Amendment's democratic rights formally unamendable.[114]

The First Amendment states that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'[115] In order to remain consistent according to its own terms, the First Amendment's democratic rights must be afforded special deference and treated as implicitly unamendable. That is not to suggest that the First Amendment's democratic rights are or should be eternal, even in the face of revolution. Unamendability, whether formal or informal, is defenceless against any effort to create a new constitutional regime. But unamendability can be enforced within an existing, legally continuous regime where political actors operate by the textual rules of legal change.

The distinction between legally continuous and discontinuous change returns us to our earlier discussion on amendment and revision.[116] In his study of Article V, John Rawls inquires whether it is 'sufficient for the validity of an amendment that it be enacted by the procedure of Article V?'[117] Rawls rejects the formalist view, most effectively advocated by John Vile,[118] that there are no substantive limits to formal amendment under the United States Constitution. Rawls suggests that the Supreme Court could follow the Indian model of judicial review to invalidate a constitutional amendment that had satisfied all of the procedural strictures of Article V. He bases his theory of judicial invalidation of a constitutional amendment on the distinction between amendment and revision. The idea of amendment, he explains, entails two possibilities. First, as in the case of the Reconstruction Amendments, it is 'to adjust basic constitutional values to changing political and social circumstances, or to incorporate into the constitution a broader and more inclusive understanding of those values.'[119] And second, as illustrated by the Sixteenth Amendment's authorisation to Congress to impose an income tax, it is 'to adapt basic institutions in order to remove weaknesses that come to light in subsequent constitutional practice.'[120]

Where constitutional change is more significant than these two kinds, the result, explains Rawls, is to revise the Constitution, not to amend it. In these cases, Rawls explains, the Court should defend the Constitution's basic framework and presuppositions

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[114] The claim here echoes the argument that it would result in more than a mere 'amendment' to the Constitution to alter fundamental rights that are essential to democratic self-government. See Stephen Macedo, *Liberal Virtue: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Clarendon Press 1990) 183.

[115] US Const, amend I (1791).

[116] See text accompanying notes 37–65.

[117] John Rawls, *Political Liberalism* (Columbia University Press 2005) 238.

[118] John Vile, 'The Case Against Implicit Limits on the Constitutional Amending Process' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (PUP 1995) 213.

[119] Rawls (n 117).

[120] ibid 239.

from alteration by simple amendment. Rawls illustrates his theory with reference to the First Amendment. Because its repeal would create a new regime, the Court, he suggests, should be prepared to invalidate an amendment repealing or proposing to repeal the First Amendment absent the recognition and self-awareness, reflected in special procedures, that the people were affecting a revolution-level change:

> The Court could say, then, that an amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world. It is therefore invalid. . . . Should that happen, and it is not inconceivable that the exercise of political power might take that turn, that would be constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution. The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning.[121]

The view that even a freely amendable constitution requires some minimal impairment of the right to constitutional amendment is intriguing in the case of the United States.[122] Rooted in a revolutionary tradition of popular sovereignty, democratic government in the United States rejects unamendable constitutional constraints because the constitutional traditions of the polity disclaim the right of one generation to make fundamental choices of self-definition for another.[123] Thus the right to popular choice —the right of rights, as Jeremy Waldron calls the right to participate[124]—must itself be protected from present and future majorities, even if it is their freely expressed choice to waive forever their right to choose. The implicit unamendability of the right to popular choice in turn frustrates the 'illegitimate entrenchment of the *status quo*'.[125] Here, then, the exception to the general rule against unamendability in the United States presents itself: the First Amendment's democratic rights must themselves be unamendable in order to preserve the free amendability of the United States Constitution.[126] Accordingly, we could interpret the First Amendment's democratic rights as implicitly entrenched against amendment on the theory that 'constitutional rules that disentrench by keeping open the channels of constitutional change must themselves be entrenched.'[127] Popular choice, then, entails some unamendable core of democratic expression.[128] The challenge of course remains determining what precisely this core democratic right requires.

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121 ibid (internal citations omitted).

122 For a useful discussion, see Samuel Freeman, 'Political Liberalism and the Possibility of a Just Democratic Constitution' (1994) 69 *Chicago-Kent Law Review* 619, 662–67.

123 Gordon S Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press 1998) 378–83.

124 Jeremy Waldron, *Law and Disagreement* (OUP 1999) 232 (quoting William Cobbett).

125 Amar (n 109).

126 This could also entail the same rule under state constitutions insofar as art V requires states to ratify amendments in either conventions or legislatures.

127 Amar (n 109).

128 Akhil Reed Amar, 'The Consent of the Governed: Constitutional Amendment Outside Article V' (1994) 94 *Columbia Law Review* 457, 505.

The judicial role in constitutional amendment

Interpreting the United States Constitution as implicitly entrenching an unamendable core of First Amendment democratic rights presupposes an authoritative body to delimit the boundaries of the Constitution's unamendability.[129] One choice is the United States Congress, the legislative branch, which formally exercises the lawmaking power under the Constitution.[130] By comparison, the Norwegian Constitution authorises the Parliament to internalise the power to review constitutional amendments within the lawmaking process,[131] as would be the case were Congress given the power to review amendments. Yet assigning this power to the legislature would, at the very least, be an unconventional choice because the judiciary is more commonly the institution authorised to declare an amendment unconstitutional in constitutional democracies that recognise the concept of an unconstitutional constitutional amendment.[132] In the United States, where the power of constitutional review has historically resided in courts,[133] tradition would dictate that the judiciary possess the power to review constitutional amendments, if the power is to exist at all.

Procedure and substance

A constitutional court may review the constitutionality of an amendment on either procedural or substantive grounds.[134] A constitutional amendment may be deemed procedurally unconstitutional where, for example, it fails to conform to the textual strictures on majorities, quorums, sequencing or other requirements on the process by which an amendment is proposed, ratified or promulgated. In contrast, an amendment may be ruled substantively unconstitutional where its content is judged contrary to an explicitly or implicitly unamendable provision. As discussed above, the Supreme Court of the United States has rejected challenges to the Eighteenth and Nineteenth

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[129] Conrado Hübner Mendes, 'Judicial Review of Constitutional Amendments in the Brazilian Supreme Court' (2005) 17 *Florida Journal of International Law* 449, 455 (exploring the role of the Brazilian Supreme Court in interpreting the Brazilian Constitution's 'cláusulas pétreas').

[130] US Const, art I, § 1.

[131] Eivind Smith, 'Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway' (2011) 44 *Israel Law Review* 369, 383–87.

[132] See generally Kemal Gözler, *Judicial Review of Constitutional Amendments* (Ekin Press 2008) (identifying courts in constitutional democracies that possess the power to review the constitutionality of constitutional amendments).

[133] *Marbury v Madison*, [1803] 5 US (1 Cranch) 137; Eugene V Rostow, 'The Democratic Character of Judicial Review' (1952) 66 *Harvard Law Review* 193, 195–96. For a study of the pre-constitutional roots of judicial review, see Mary S Bilder, 'The Corporate Origins of Judicial Review' (2006) 116 *Yale Law Journal* 502.

[134] For illustrations of each, consider the Turkish Constitutional Court, which has invalidated amendments on both procedural and substantive grounds. See Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel Law Review* 321, 322–25.

Amendments, and in doing so appears to have refused to recognise the possibility of an unconstitutional constitutional amendment with respect to the substance of an amendment. But in its review of constitutional amendments, the Court appears to have remained open to the possibility of invalidating an amendment on the basis of its procedural failure or irregularity.[135]

The Court has heard at least five cases in which it has reviewed, on procedural grounds, the constitutionality of a constitutional amendment. In its first decade, the Court rejected the argument that a constitutional amendment proposed by Congress, in this particular case the Eleventh Amendment, must conform to the Constitution's presentment requirement.[136] The president, wrote the Court, 'has nothing to do with the proposition, or adoption, or amendments to the Constitution'.[137] Later, in denying a challenge to the Eighteenth Amendment, the Court held that the Article V requirement of two-thirds vote to propose an amendment refers to two-thirds in each house, assuming a quorum, and not to two-thirds of the entire composition of the legislature.[138] The Eighteenth Amendment was subsequently once again the subject of a constitutional challenge when the Court held that the choice of the method of amendment ratification, whether state legislative vote or convention, belongs to Congress exclusively.[139]

The other two cases must be read together. Both concern the matter of contemporaneity between proposal and ratification, and ask two questions: first, how long is too long between the proposal and ratification of an amendment; and second, which institution should judge the adequacy of contemporaneity between proposal and ratification? In 1921, the Court rejected the argument that Congress had improperly imposed a seven-year time limit on states to ratify an amendment proposal.[140] The Court held Congress could indeed impose a time limit in order to ensure that ratification is 'sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.'[141] Twenty years later in 1939, the Court narrowed its holding. The Court held that where Congress has not imposed a time limit for states to ratify an amendment proposal, ratification must nonetheless occur 'within some reasonable time after the proposal'[142] and, in the event of disagreement on what is reasonable, the view of Congress, not of the Court, governs.[143] Thus the Twenty-Seventh

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135 One scholar has argued that the Court should assert the power to police the formal rules of art V. See Walter Dellinger, 'The Legitimacy of Constitutional Change: Rethinking the Amendment Process' (1983) 97 *Harvard Law Review* 386, 432.

136 *Hollingsworth v Virginia,* [1798] 3 US (3 Dallas) 378.

137 ibid 382.

138 *National Prohibition Cases* (n 83).

139 *United States v Sprague*, [1931] 282 US 716, 730.

140 *Dillon v Gloss*, [1921] 256 US 368.

141 ibid 375.

142 *Coleman v Miller,* [1939] 307 US 433, 452.

143 ibid. That *Coleman* was decided only by a plurality has raised doubts about its precedential value. See Michael Stokes Paulsen, 'A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment' (1993) 103 *Yale Law Journal* 677, 718–21.

Amendment, which had been proposed in 1789 but not ratified until two centuries later in 1992, was unopposed by Congress at the time of its ratification,[144] its procedural regularity was defended by the Department of Justice,[145] and a federal court refused to hear a challenge to its constitutionality.[146]

Modest substantive judicial review

Interpreting First Amendment democratic rights as implicitly entrenched against amendment would therefore require the Court to exercise the power to review constitutional amendments on substantive grounds, a power that the Court has historically rejected. In light of the extraordinary nature of this power in a constitutional democracy as well as the United States Supreme Court's expressed reluctance to invoke it, there are two questions in need of answers: first, can we justify, on democratic bases, conferring this vast power upon the Court; and, second, can there be a *democratic* form of judicial review of constitutional amendments?

On the first question, I concede that I do not have what I consider to be a winning answer, which is why I have long held the contrary view.[147] For the purposes of this Article, however, I presuppose an answer for the sake of argument. The answer, if a satisfactory one exists, would distinguish between constituent and constituted powers, and within constituent powers, its original and derived forms.[148] On this theory, the Court's role is to enforce the limits of unamendability imposed by the original constituent power, and judges may therefore invalidate a constitutional amendment that changes the essential nature of constitution that the original constituent power had authorised, and that the constituent power alone can change.[149] We could build an argument that this is a democratically legitimate judicial role in light of the constituent power's implicit entrenchment of First Amendment democratic rights against amendment.[150]

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144 Paul E McGreal, 'There is no Such Thing as Textualism: A Case Study in Constitutional Method' (2001) 69 *Fordham Law Review* 2393, 2431.

145 Memorandum Opinion for Counsel to the President, 16 Op Off Legal Counsel 87 (November 2, 1992).

146 See *Boehner v Anderson*, [1992] 809 F Supp 138 (DDC).

147 Albert (n 1); Albert (n 2); Albert (n 3).

148 Yaniv Roznai and Serkan Yolcu, 'An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision' (2012) 10 *International Journal of Constitutional Law* 175, 191–94.

149 ibid.

150 That the First Amendment was the result of an amendment to the Constitution—and therefore the result of proposal and ratification by the constituted power, not by the constituent power—weakens this justification. But it can perhaps be redeemed in part or in whole by observing that the textual entrenchment of the First Amendment, as part of the Bill of Rights, was a condition to the ratification of the Constitution. See Leonard W Levy, *Origins of the Bill of Rights* (Yale University Press 2001) 1–43; Akhil Reed Amar, 'The Bill of Rights and the Fourteenth Amendment' (1992) 101 *Yale Law Journal* 1193, 1202.

On the second question—whether in the United States there can be a *democratic* form of judicial review of constitutional amendments that are said to violate First Amendment democratic rights—it is just as difficult to persuade judicial sceptics.[151] One possible answer is to propose a modest form of substantive judicial review in the United States that does not extend as far as the Indian Supreme Court's basic structure doctrine but that nonetheless authorises the Court to protect the Constitution's implicitly unamendable core democratic rights under the First Amendment. This would be a middle ground of sorts between what Joel Colón-Ríos has termed strong-form basic structure judicial review and conventional strong-form judicial review.[152]

Here, the Supreme Court would be operationalising the distinction between amendment and revision. The dividing line between the two, for the Court, would be the First Amendment's freedom of democratic expression. A constitutional alteration that does not affect those implicitly entrenched rights would qualify as a proper amendment, provided it conforms to the procedural strictures of Article V. In contrast, a constitutional alteration that did indeed violate the First Amendment's implicitly entrenched democratic rights would work a revision to the Constitution, and could therefore not be accomplished using the constitutional amendment procedures in Article V. The role of the Court would be to enforce that distinction in the service of both the distinction itself and also of the democratic foundations of the United States Constitution.[153]

On this theory of democratic judicial review, it is the Court's role to invalidate an amendment to First Amendment democratic rights in order to defend democracy in the United States. Defending democracy would entail enforcing the Constitution's fundamental presuppositions about the centrality of popular choice—an umbrella of rights implicitly protected against amendment by the First Amendment. This would create a paradoxical circumstance: in order to preserve the free amendability of the Constitution, the Supreme Court would have to interpret and enforce the Constitution as implicitly entrenching First Amendment democratic rights against amendment. This

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[151] In the United States, where the Constitution is extraordinarily difficult to amend formally, the case for judicial review of constitutional amendments is weaker than it is in India, for example, where the formal rules of constitutional amendment are, by comparison, much easier to satisfy. The more difficult it is to achieve cross-institutional consolidation behind a constitutional amendment, the greater the legitimacy we attribute to a successful amendment and, in my view, the lesser the appropriateness of judicial intervention. See Albert (n 1) 44–46.

[152] See generally Joel Colón-Ríos, 'A New Typology of Judicial Review of Legislation' (2014) 3 *Global Constitutionalism* 143 (outlining a five-part typology of judicial review).

[153] The question becomes whether *any* violation is sufficient to warrant judicial involvement. A reasonable way for judges to approach this question, though one that is still difficult to operationalise with reliability across time and among different judges, is to intervene only where the violation would amount to a fundamental abandonment of the unamendable right, that is to say a violation that is not a mere deviation from the unamendable principle but an attack on it. See Yaniv Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act' (2014) 8 *Vienna Journal on International Constitutional Law* 29, 39–40.

'democratic' form of judicial review ironically authorises the Court to invalidate a constitutional amendment, which seems decidedly undemocratic. Yet the irony would reflect a basic truth in law: every rule admits of some exception, often in reinforcement of the general rule. Here, the exception to the free amendability of the United States Constitution would be intended only to make possible its continued democratic amendability.

To illustrate how the United States Supreme Court might invalidate a constitutional amendment in defence of democracy, consider a recent case from the Czech Constitutional Court. In 2009, the Constitutional Court invoked the idea of an unwritten 'substantive core' of the Czech Constitution to strike down a constitutional amendment proposing to shorten the legislative term of office in mid-stream of an ongoing term.[154] The Court explained that the unwritten substantive core of the Czech Constitution consists of rights and values, including popular sovereignty, the right of resistance, basic principles of fair election, and the rule of law principles of generality, non-retroactivity and predictability of law.[155] The Court held that the notion of predictability in legislative terms was a fundamental feature of democracy under the Czech Constitution, a feature that could not be violated by a constitutional amendment, not even an amendment that met all procedural conditions entrenched in the constitutional text.[156] For the Court, this democratic feature was central to the Constitution's identity, and the Court saw its role as protecting the Constitution's substantive core from attacks concealed as constitutional amendments.[157]

The elusive unconstitutional constitutional amendment

The role of the Supreme Court in the United States could be much the same were First Amendment democratic rights understood to be implicitly entrenched against amendment. The Court would see itself, and it would be seen, as defending the unamendable substantive core of the Constitution where it was faced with a challenge to a constitutional amendment alleged to impinge on a First Amendment democratic right. In theory, then, we can envision how the Court, and indeed all other federal courts, would conduct themselves as guardians of the Constitution in a regime with an implicitly unamendable constitutional principle, rule, value, structure or institution. In reality, however, it is important to inquire how and even whether theory maps onto application.

Consider for example the recently failed Twenty-Eighth Amendment proposal. In June 2013, Senator Tom Udall proposed an amendment that would have authorised

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[154] Kieran Williams, 'When a Constitutional Amendment Violates the 'Substantive Core': The Czech Constitutional Court's September 2009 Early Elections Decision' (2011) 36 *Review of Central and East European Law* 33, 42.

[155] ibid 42–43.

[156] ibid 43.

[157] ibid 49–50.

Congress and the states to regulate campaign fundraising and expenditures.[158] The proposal was a direct response to the Supreme Court's controversial judgment in *Citizens United v Federal Election Commission*,[159] which deregulated much of electoral campaign finance. The Court held in *Citizens United* that Congress may not ban corporations and unions from making independent expenditures in connection with an election campaign.[160] Udall's amendment proposal was one of several that had been introduced to reverse the Court's ruling in *Citizens United*.[161] But his proposal came closer than most others to becoming law, as it was approved for debate in the Senate by a vote of 79 – 18,[162] only to later be defeated by a narrow margin of 54 – 42.[163]

This campaign finance amendment proposed to give electoral regulatory powers to the legislative branch in both levels of government.[164] The stated purpose of the proposal was 'to advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes.'[165] The proposal intended to authorise Congress to 'regulate the raising and spending of money and in-kind equivalents with respect to Federal elections'[166] including but not limited to imposing limits on contributions to candidates in both primary and general elections, and on expenditures 'by, in support of, or in opposition to such candidates'.[167] The proposal also sought to give the same powers to states with respect to state elections.[168] Importantly, the proposal insisted that 'nothing in this article shall be construed to grant Congress the power to abridge the freedom of the press.'[169]

Suppose the Twenty-Eighth Amendment had passed the House, the Senate and ultimately been properly ratified by three-quarters of the states, as required by Article V. Suppose also that, after failing in the lower federal courts, a plaintiff with standing had successfully petitioned the Supreme Court to review the substantive constitutionality of the amendment. Suppose further that the First Amendment's democratic rights were

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158 Press Release, 'Udall Introduces Constitutional Amendment on Campaign Finance Reform', Senator Tom Udall Official Website, 18 June 2013 <http://www.tomudall.senate.gov/?p=press_release&id=1329>.

159 558 US 310 (2010).

160 ibid 365–66.

161 See eg H J Res 31, 113th Cong (2013) (proposing amendment on campaign finance); S J Res 29, 112th Cong (2011) (same); see also Byron Tau, 'Obama Calls for Constitutional Amendment to Overturn Citizens United' Politico, 29 August 2012 <http://www.politico.com/politico44/2012/08/obama-calls-for-constitutional-amendment-to-overturn-133724.html> (reporting that President Barack Obama urges a 'serious look at a constitutional amendment to revise the Supreme Court's *Citizens United* ruling').

162 Kathleen Hunger, 'Senate Advances Campaign-Finance Constitutional Amendment', Bloomberg News, 9 September 2014 <http://www.bloomberg.com/news/2014-09-08/senate-advances-campaign-finance-constitutional-amendment.html>.

163 Burgess Everett, 'Senate Blocks Campaign Finance Amendment' Politico, 11 September 2014 <http://www.politico.com/story/2014/09/senate-block-campaign-finance-amendment-110864.html>.

164 S J Res 19, 113th Cong (2013).

165 ibid para 1.

166 ibid.

167 ibid paras 1(1)–(2).

168 ibid para 2.

169 ibid para 3.

generally understood to be implicitly unamendable. Faced with these circumstances, would the Court invalidate the amendment today as infringing the presently-recognised rights of corporations and unions to exercise democratic rights?[170] [I use this example because of its timeliness, not necessarily because it is the best one for analytical purposes. A better though less timely example would be an amendment prohibiting people from burning the American flag.]

The Court would have at least four options, none of which would be compelled by the implicit unamendability of the First Amendment's democratic rights. First, the Court could uphold the amendment as a procedurally proper exercise of the amendment power conferred upon political actors. Yet the doctrine of unconstitutional constitutional amendments precludes such a formalist analysis because the very theory of a substantively unconstitutional constitutional amendment presupposes that procedural correctness alone is ineffective to shield an amendment from invalidation. Second, the Court could theoretically uphold the amendment as substantively constitutional. Notwithstanding the currently constituted Court having issued the judgment reversed by the amendment,[171] the Court could find a way to construe the amendment as consistent with the unamendable First Amendment by carving out an exception to its own absolutist language.

In the third and fourth options, respectively, the Court could invalidate the law on either procedural or substantive grounds. There being no procedural irregularity in the posited counterfactual, what would remain is the fourth option: the possibility of a substantively unconstitutional constitutional amendment. Just as the Court could construe the First Amendment's implicitly unamendable democratic rights as admitting of an exception, it could just as easily interpret those rights as absolutes subject to no violation even in exceptional circumstances. In this scenario, the Court would strike down the amendment. Yet invalidation strikes me as unlikely in light of the robust culture of popular choice the Court would be seeking to vindicate by treating First Amendment democratic rights as implicitly unamendable. It would raise too sharp a contrast for the Court to recognise on the one hand that the Constitution is anchored in popular choice, and therefore requires making First Amendment democratic rights implicitly unamendable, and on the other to invalidate an amendment whose intent is to create a more egalitarian model of campaign finance and political speech than currently exists.

It is not clear what an unamendable First Amendment would change in the United States in terms of interpretation or enforcement, particularly given the politicisation of

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[170] Kyle Langvardt, 'Imagine Change Before and After *Citizens United*' (2012) 3 *Alabama Civil Rights & Civil Liberties Law Review* 227, 241–43 (exploring how corporate and union rights would be violated in overruling *Citizens United*).

[171] However, it would not be unprecedented for a Court to abandon a position on a matter of constitutional interpretation that had been repudiated by political actors as well as the public. A prominent example is the Court's acquiescence to political and public pressure in the New Deal era. Compare *US v Darby*, [1941] 312 US 100, 123 (overruling *Hammer*) with *Hammer v Dagenhart*, [1918] 247 US 251, 273–74 (distinguishing commerce from manufacturing and prohibiting Congress from regulating manufacturing).

the Court, whose composition is often determinative of the outcome. Unamendability would not be self-executing in the sense that it would itself bar political actors from trying to pass a constitutional amendment that divests or seriously impinges upon First Amendment democratic rights. Nothing about explicit or implicit entrenchment against amendment dictates the outcome when the entrenched value is interpreted by the ultimate arbiter of constitutionality. And this may in fact be a virtue: the continued contestability of constitutional meaning is consistent with popular choice and outcome-neutrality, two fundamental pillars that support the whole of the Constitution.

It is true, though, that the very fact of the implicit unamendability could cause political actors to pause before acting. Courts, for their part, would have to resolve each challenge to the constitutionality of a constitutional amendment in much the same way that they today resolve challenges under the First Amendment: with vast powers of interpretive and methodological latitude that make it possible to defend any reasonable view of the Constitution. (Here, I am assuming that the political actors in the United States, now a mature democracy, would not today pass an unreasonable amendment that openly and nefariously denies democratic rights to one or more classes of persons.)

Despite the difficulty of projecting with any assurance how the informal entrenchment of the First Amendment's democratic rights would change the Court's interpretation of those rights, there is one clear and valuable consequence of implicitly recognising the unamendability of First Amendment democratic rights: the expressive role that such recognition plays. Scholars have theorised that constitutions express values. For instance, they have argued that constitutions may be designed to reflect a jurisdiction's constitutional identity,[172] to show how a 'nation goes about defining itself',[173] to 'create a shared consciousness',[174] or to make a statement about a nation's objectives and aspirations.[175] Constitutions are commonly designed to reflect these values in the preamble[176] or elsewhere in the main text.[177] But constitutional designers also use unamendability as a way to convey internally and to the wider world the values that matter most to their constitutional community. Where constitutional designers disable formal amendment rules as to one or more constitutional provisions the message

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[172] Gary J Jacobsohn, *Constitutional Identity* (HUP 2010) 348.

[173] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (PUP 2009) 12.

[174] Tom Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010) 117, 118.

[175] Cass R Sunstein, 'On the Expressive Function of Law' (1996) 5 *East European Constitutional Review* 66, 67.

[176] See eg France Const., prmbl. (1958) (identifying justice as a constitutional value); Switzerland Const, prmbl (1999) (identifying liberty as a constitutional value); Venezuela Const, prmbl (1999) (identifying democracy as a constitutional value).

[177] See eg Kazakhstan Const, § I, art 1(1) (1995) (identifying human dignity as a constitutional value); South Africa Const, ch 1, § 1 (1996) (identifying the rule of law as a constitutional value); Spain Const, art 1 (1978) (identifying secularism as a constitutional value).

is that the provision or provisions are special and worthy of special designation, if not enforceable protection. As I have explained elsewhere:

> The degree to which a constitutional provision is insulated from formal amendment and from the unpredictability of constitutional politics is in this case a proxy for preference. The stricter its entrenchment, the higher the constitutional worth of a given provision. Absolute entrenchment against formal amendment is thus the strongest statement of a provision's value.[178]

Recognizing the implicit unamendability of the First Amendment's democratic rights may therefore be useful even where the interpretation and enforcement of unamendability risks being both unreliable and ineffective. Perhaps, then, the best function of the implicit unamendability of the First Amendment's democratic rights is to express what is most valued in the constitutional culture of the United States. The expressive function of unamendability is, in my view, more compelling where the inviolability of the protected value is textually entrenched than where the inviolability of the value is rooted only in a judicial opinion. Nonetheless, the judicial recognition of the centrality of the First Amendment's democratic rights—even where the Court's interpretation of those rights is contestable—would convey their special importance in the United States.

Conclusion

I began with a challenge: does the United States Constitution make anything unamendable? We know that nothing in its text is today formally unamendable. But the question remains whether the Constitution could be interpreted as requiring some form of unamendability in order to survive according to its own terms. I suggested that we could understand the Constitution and its political and judicial evolution over time as requiring First Amendment democratic rights to be implicitly unamendable.[179] This, I argued, is a great paradox of the United States Constitution: in order for it to cohere internally as a freely amendable social contract, we must interpret it as implicitly making the First Amendment's democratic rights formally unamendable, and consequently restricting in this narrow but important way the fundamental democratic right of constitutional amendment. I suggested a modest form of substantive judicial review and questioned whether it could be an effective way of enforcing these implicitly unamendable democratic rights. My sceptical posture toward unamendability persuaded me that the answer was unclear at best, though I closed by recognising the value of unamendability, both formal and informal, in its expressive function.

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[178] Albert (n 34) 254.

[179] An equally useful approach would not ask whether the First Amendment is implicitly unamendable, but whether in the First Amendment's absence from the constitutional text the Supreme Court would find the democratic rights it entrenches nonetheless implied. The High Court of Australia, for example, has found an implied right to political expression where the constitutional text entrenches no such right. *See Australian Capital Television*, [1992] HCA 45; [1992] 177 CLR 106.